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No. 06-1614

In the
Supreme Court of the United States

POOH BAH ENTERPRISES, INC., et al.,
Petitioners,

v.

THE CITY OF CHICAGO, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

MOTION TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF OF *AMICI CURIAE* FIRST AMENDMENT LAWYERS ASSOCIATION AND THE FREE SPEECH COALITION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court, the First Amendment Lawyers Association and the Free Speech Coalition hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the attorneys for petitioner was requested and obtained. The consent of the attorney for respondent was requested but was refused.

The interest the First Amendment Lawyers Association is derived from the fact that the organization is composed of attorneys whose practices substantially involve advocating for free expression matters including, in virtually every member's case, matters concerning sexually oriented expression, often in virtually identical scenarios as the one reflected in the instant case. The members are deeply concerned that both state and federal courts throughout the country need guidance and specificity to eliminate the manifest confusion and inconsistent application of this Court's "secondary effects" jurisprudence, which confusion and inconsistency is rampant throughout the federal district courts, circuit courts, and every level of state court dealing with issues involving challenges to legislative restrictions on "adult entertainment."

The interest of the Free Speech Coalition is similar, in that the Free Speech Coalition is the trade association of the adult entertainment industry and is composed of businesses and individuals each of which is involved in some aspect of that industry. Its members include businesses which present expressive entertainment of the same format as that restricted by the legislation at issue in the instant action. The Free

Speech Coalition is often faced with questions from members seeking guidance on issues similar to those presented.

This Petition has national implications for the evaluation of legislation dealing with an analysis of the "secondary effects" doctrine, an issue of far greater proportions than the isolated issues involved in the instant action, which issues go to the heart of the integrity of the judicial system and the fair and consistent application of the rules of evidence in cases involving adult entertainment issues.

For the above reasons, the First Amendment Lawyers Association and the Free Speech Coalition respectfully request that this Motion for Leave to File the Attached Brief, *amici curiae* be granted.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Although not strictly required by Rule 29.6 or 37.5, the instant *Amici* submit the following corporate disclosure statement:

Each of the *Amici* is a nonprofit corporation. None has any parent corporation, and none has issued any stock. For this reason, no parent or publicly held company owns 10 % or more of the stock of any of the *Amici* corporations.

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INTEREST OF *AMICI*

Amicus First Amendment Lawyers Association is composed of attorneys whose practices substantially involve free expression matters including, in virtually every member's case, matters concerning sexually oriented expression. The members are deeply concerned that both state and federal courts throughout the country need guidance and specificity to eliminate the manifest confusion and inconsistent application of this Court's "secondary effects" jurisprudence, which confusion and inconsistency is rampant throughout the federal district courts, circuit courts, and every level of state court dealing with issues involving challenges to legislative restrictions on "adult entertainment."

Amicus Free Speech Coalition is the trade association of the adult entertainment industry and is composed of businesses and individuals each of which is involved in some aspect of that industry. Among its members are retailers of sexually-oriented expression and clubs presenting erotic dancing. These members and others face the sort of differentially restrictive zoning regulations at issue here.

Counsel for the Petitioners are among the approximately 200 members of the *Amicus* First Amendment Lawyers Association.[1] None of the Petitioners is otherwise a member of the *amicus*.

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[1] No counsel for any party authored this brief in whole or in part, and no one other than the instant *Amici* and their counsel and members made any monetary contribution to the preparation or submission of this brief. *Cf.* Rule 37.6.

CONSENT OF THE PARTIES

The consent of the attorneys for petitioners was requested and obtained. The consent of the attorney for respondent was requested but refused. Thus, a motion requesting leave to file the instant brief precedes. Rule 37. 2(b)

ARGUMENT IN SUPPORT OF THE PETITION

This case presents an important and critical question regarding issues that have both confused and tortured courts at every level of state and federal judiciaries, both before and, troublingly, *after* this Court's divided decision in *City of Los Angeles v. Alameda Books,* 535 U.S. 425, 438, 152 L. Ed. 2d 670, 122 S. Ct. 1728 (2002). Even though many of the factual scenarios of these cases differ, the evidentiary analysis is the same whether alcohol is involved or not. This confusion has emanated from the first true articulation of the "burden shifting" evidentiary process to deal with challenges to "shoddy data and evidence" so often used by governmental bodies to support legislation that is seldom based on any actual concern for "secondary effects," but more often the product of objections to the "content" of the expression. This Court is being called upon to provide guidance and specificity as to what ***analytical framework*** and type of ***evidentiary burden*** must be utilized in evaluating challenges to adult entertainment legislation. Since this legislation directly impinges on the exercise of fundamental First Amendment rights and imposes regulatory and operational restrictions that, under the guise of being adopted to address the alleged "adverse secondary effects" purportedly caused by the adult businesses sought to be regulated, often results in the annihilation of those businesses, this petition seeks to eliminate the practice of countless courts in "picking and choosing" isolated language from the *Alameda Books* decision

to support totally inconsistent and irreconcilable approaches to the "burden shifting" analysis articulated therein.

This case is about one of the most precious aspects of the First Amendment: at what point can the government impose "censorship under the guise of legislation." This goes to the core fundamental right of citizens to choose what type of entertainment they wish to partake of without unjustified governmental interference or the total elimination of First Amendment freedoms. *Amici* urges the acceptance of the Petition for review and clarification because it satisfies each of the factors identified in Rule 10 that guide this Court's decisions as to whether or not to grant certiorari review. The decision of the Illinois Supreme Court, in addition to being a manifest denial of Petitioners' due process rights by failing to allow Petitioner to fully litigate its claims because of judicial rulings in Petitioners' favor that "cut off" Petitioners' presentation of additional evidence and testimony in its favor that were later reversed, is in direct and irreconcilable ***conflict with decisions of this Court***. The questions presented identify a critical ***conflict among the federal circuits***, and both state and federal courts across the Nation have cried out for clarification of the Byzantine framework that this Court's recent divided decisions on adult entertainment legislation have created, even if unintentionally.

Of equal importance, the Illinois Supreme Court has decided a ***significant question of federal law,*** arising under the Free Speech Clause of the First Amendment, that has been consistently interpreted in different ways by multiple state and federal courts, on critical issues that have not been clearly settled by this Court, but that cry out for resolution, a fact articulated by the state decision at issue herein, and repeated at every state and federal level, either explicitly, or by implication. This has been brought about by differing and

irreconcilable opinions arising from the various courts dealing with the issue.

It is of the utmost constitutional importance that this Court grants this Petition. The First Amendment is concrete evidence of our "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). But in virtually every level of the judiciary today, and robustly evident throughout the Federal Circuits misconstruing or attempting to "fill in the blanks" of this Court's prior adult entertainment decisions, the right to Free Speech is in extreme peril. If censorship, achieved through the imposition of regulations that infringe on the lawful operation of such businesses, can occur with ***no clear burden*** on the government to prove any governmental interest served by that censorship, freedom is lost.

This case involves nothing less important than the First Amendment, and the decision sought to be reviewed in this Court, as set forth below, is worthy of consideration, if for no other reason than the confusion in this area of the law repeatedly complained of by virtually every court trying to fairly and consistently apply the Rule of Law to these critical First Amendment issues.

I. The Rejection of "The Rules Of Evidence" In Adult Entertainment Cases Is In Direct Conflict With This Court's Decision In *City of Los Angeles v. Alameda Books* And Further Aggravates The Existing Split Of Authority And Confusion Interpreting That Decision

The confusion over applying the *Alameda Books* case, and the apparently "optional" and sporadic allowance of any proper evidentiary analysis of the "burden shifting" procedure

articulated in that case, has been repeatedly complained about by many courts. For example, one court articulated the problem as follows:

> "[This]... presents an issue that has ***often been litigated in the courts of this nation***: when and to what extent may the government regulate an adult use...***[R]esolution of this issue is complicated by court's inability to articulate a clear set of principles to govern cases such as these.***"[2]

Through this action, Petitioner seeks to have this Court establish an unequivocally "***clear set of principles,***" and to establish an appropriate evidentiary framework for the courts, not only in Illinois, but in every other court in the Country that must deal with these issues. This Court should grant the petition and craft a workable framework where some modicums of the rules of evidence are applied to "secondary effects" challenges. Petitioner clearly seeks a way to ensure that all courts apply ***consistently*** and with ***precision*** a minimum of evidentiary fairness in this controversial, frequently litigated, but critical area of Free Speech. This is required by the barest modicums of both the equal protection doctrine and substantive due process. *Amici* also urge this Court to grant review to reconcile the monumental conflict between the Federal Circuit Courts in their application of *Alameda Books*, and its state and Federal progeny, and seek a the day when such evidentiary evaluations will be constitutionally consistent.

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[2] *XLP Corp. v. Lake County*, 832 N.E.2d 480, 359 Ill. App. 3d 239 (2nd Dist. 2005).

Unfortunately, despite this Court's best attempts, the state of the law is in chaos. More than one court has complained that guidance from the Supreme Court on this issue has been somewhat less than clear, and the courts have complained that they must begin their analysis by setting forth the law in the best fashion they can from applicable precedent, noting that doing so is very difficult. Many courts are virtually crying out, almost directly, for the necessity of this Court to enunciate a clear evidentiary standard, eliminating any question, and eliminating any "nebulous state of the case law" that would interfere with the consistent and properly guided evaluation of similar issues by the courts everywhere these issues frequently arise. If the number of cases where identical concerns are articulated does not inspire this Court to accept review of this matter, then countless courts will be inevitably destined to evaluate similar challenges regarding the critical issues presented by the instant action, and relegated to the same evidentiary chaos that has resulted from either an inability or a flat refusal to properly apply *Alameda Books*, all at a grave cost, not only to liberty, but to the preservation of the Rule of Law. It is respectfully requested that this Court grant this Petition.

II. This Court has Historically Shown a Desire to Protect the First Amendment, Even in Areas of Great Controversy, and Should Do So in this Action

From a historical perspective, this Court has consistently shown a desire to protect the First Amendment, even, and sometimes particularly, in areas of great controversy. As this Court has stated, there is a presumption that any governmental restraint on expressive conduct is impermissible. *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 95 S. Ct. 1239 (1975). The *Alameda Books* decision and the articulation of the "burden shifting"

procedures articulated therein, was not entirely unprecedented. Early on, ***simply applying the rules of evidence***, this Court held that, once a party demonstrates that a regulation deprives it of protected freedom of expression, the burden shifts to the governing body to justify that infringement. See *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803, 104 S. Ct. 2118 (1975). To address the issue from its most basic starting point, any form of legislation restricting any businesses deemed to be "adult entertainment" must be analyzed under the First Amendment. *Barnes v. Glen Theatre*, 501 U.S. 560 (1991); *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), *cert. den.*, 115 S.Ct. 1697 (1995).

From the earliest decisions dealing with the regulation of adult entertainment businesses, it was established that the legislation at issue could only be justified if it regulated or addressed a legitimate governmental interest, established by *evidence* showing the existence of problems that would be favorably addressed by the legislation, to prevent the so-called "adverse secondary effects" *shown to exist,* that were allegedly engendered by adult entertainment establishments. *Young v. American Mini Theatres*, 427 U.S. 50 (1976), *Renton, supra*. A requirement of this concept was that the existence of these adverse secondary effects be *established* through competent, substantial evidence. *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985); *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982). *Alameda Books* was not the first case to identify this fundamental requirement. Under the clear mandates of the law articulated in *Alameda Books*, it is a fundamental concept of statutory construction to make sure that the restrictions imposed by legislation are actually supported by the evidence trying to establish the existence of an otherwise unremediated

governmental interest. See *Basiardanes v. City of Galveston,* 682 F2d 1203, 1213 (5th Cir. 1982). Every Ordinance requires the Court:

> "...To examine the strength and legitimacy of the governmental interest behind the ordinances and the precision with which the ordinance is drawn. Unless the ordinance ***advances*** significant governmental interests and ***accomplishes*** such advancement without undue restraint of speech, the ordinance is invalid." *Basiardanes* at 1214, citing *Schad v. Borough of Mt. Ephraim,* 101 S.Ct. at 2183-2184. (Emphasis added).

Justice Souter's dissent in *Alameda Books*, while not agreed with by all justices, is really nothing more than an articulation of the rules of evidence in the evaluation of challenges to "secondary effects" accusations against adult oriented businesses. The variations about ***what can be considered as evidence***, and what level of scrutiny should be applied, is, unfortunately but truthfully, "all over the road." *Alameda Books*, more than anything else, articulated that there could be a minimal burden for acceptable "legislative evidence," but, once challenged, the government had to carry its burden with evidence of "equal dignity," competent and substantial, if not rising to the level of *Daubert*.[3]

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[3] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), the benchmark case wherein this Court put strict limits on the admissibility of "junk science" into evidence. In all fairness, as Justice Souter articulated in his dissent in *Alameda Books*, if there is a "science" that lends itself to the evaluation of the veracity of a given issue, wouldn't the "search for the truth" be aided by its use?

Problems arise because, while virtually every court evaluating the ***Alameda Books*** case has found that Justice Kennedy's concurrence should be recognized as the decisive holding in that case,[4] there is a clear conflict in the way that the various courts dealing with these issues have attempted to apply the holdings in *Alameda Books* to their respective actions.

Even though there is agreement on who articulated the "holding" of *Alameda Books,* there is ***no agreement*** as to what type of evidence is relevant, or what that "burden" actually is, after it "shifts." Establishing that the rules of ***evidence*** apply in every judicial proceeding, it must be obvious to this Court the importance of emphasizing that the rules of evidence must be "construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that *the truth may be ascertained* and proceedings *justly administered.*" FRE 102, emphasis added. As will be shown in the following section that "search for the truth" can depend on what jurisdiction you are in, and this fact alone precludes ***any*** possibility that any such proceedings will be "justly administered."

Finally, most of the courts that are antagonistic to challenges to adult entertainment legislation appear to impose a tacit "higher" evidentiary burden on adult businesses when utilizing the "burden shifting" procedures set forth in

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[4] *Ben's Bar v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003), *SOB v. County of Benton* 317 F.3d 856 (8th Cir. 2003), *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003).

Alameda Books. Such an approach is totally improper. Since all these cases deal with ***civil matters,*** the burden is "***preponderance of the evidence,***" a fact lost on many courts dealing with these issues. See *Bourjaly v. United States*, 483 U.S. 171, 175, 107 S.Ct. 2775 (1987). Acceptance of this action for review can end this inappropriate practice, a practice perhaps never before so acutely depicted as in the *Pooh Bah* decision at issue herein.

In *Pooh Bah,* the Illinois Supreme Court totally ignored the relevant evidence, the *best evidence* of whether or not the business in question actually caused any secondary effects, by eschewing with impunity the statistical and empirical (not a dirty word in the realm of evidence) data that was compiled showing the actual characteristics of the business at issue. Instead, in a situation that would be unconscionable in any other context, the Court focused on testimony from a city planner, commenting on outdated and historical problems from decades earlier in other city areas near the location of the subject business.

III. The Refusal Or Inability of the Courts To Consistently Apply The Rules Of Evidence In Applying The *Alameda Books* Decision Has Resulted In A Denial Of Justice Throughout the Nation

The debate over what "type" or "quality" of evidence will be considered in cases challenging adult entertainment regulations has been raging ever since the "secondary effects" doctrine was first enunciated in *Young*. The answer to this problem is as easy as saying that the rules of evidence apply to "secondary effects" challenges, just as they would in any other evidentiary setting. As identified by Justice Souter in *Alameda Books*, there is both a reliable and "just" method to "test the hypothesis" of whether or not "adult uses," or even

more fairly in the search for "the truth", specific ***types*** of adult uses, not a useful term when the only common denominator of "adult businesses" in most legislation is the presumed content of expression at issue, a denominator that is virtually useless when it is used to lump together multi-million dollar dance cabarets with shabby store front massage parlors, small adult bookstores, and premises that deal only with "off premises" consumption of expressive fare. Despite operational differences that would result in the automatic judicial compartmentalization of such different types of businesses for any kind of judicial analysis of *any* issue, uses like Pooh Bah are relegated to defending governmental accusations that, if they ever occur, do not occur at "upscale facilities" lie the business operated by *Pooh Bah*.[5]

One of the most accurate articulations of *Alameda Books* is set forth in *Giggles World Corp. v. Town of Wappinger*, 341 F. Supp. 2d 427 (SDNY 2004):

> "...The burden is upon Wappinger to ***produce evidence in support of its belief that businesses such as Giggles are likely to produce harmful secondary effects.*** *See City of Los Angeles v. Alameda Books, 535 U.S. 425, 438, 152 L. Ed. 2d 670, 122 S. Ct. 1728 (2002)* (stating that "this is not to [**9] say that a municipality can get away with shoddy data or reasoning. [HN12] ***The municipality's evidence must fairly support the municipality's rationale for the ordinance.***") While Defendants' ***motion for summary judgment may demonstrate that various studies show***

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[5] *Encore Videos, Inc. v. City of Antonio*, 330 F.3d 288 (5th Cir. 2003) and *Erotique Shop Inc. v. City of Grand Prairie*, 2006 U.S. Dist. Lexis 85992 (N.D. TX. 2006).

> ***the harmful secondary effects of adult use businesses in other municipalities, Defendants still must show some evidence that Giggles' business poses a risk of causing the same type of harm."***
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> *Id.* 341 F. Supp. 2d 427, 430-31 (SDNY 2004), emphasis added.

Unfortunately, there are scores of decisions that are based on an entirely different understanding of the required evidentiary burdens. These decisions that have essentially ignored the presentation of unassailable *evidence* "casting doubt" on the findings upon which various adult use restrictions have been based, include: *G.M. Enterprises v. Town of St. Joseph, Wisconsin*, 350 F.3d 631 (7th Cir. 2003); *Worldwide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004); *Center for Fair Public Policy v. Maricopa County, Arizona*, 336 F.3d 1153 (9th Cir. 2003) *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F. Supp. 2d 672 (W.D. Kentucky 2002); *Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003); *Ben's Bar v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003); *S.O.B., Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003); *N.W. Enterprises v. City of Houston*, 352 F.3d 162 (5th Cir. 2003) *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002); *Fantasy Ranch, Inc. v. City of Arlington*, 2004 WL 1779014 (N.D. Texas 2004); and *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546 (5th Cir. 2006). These cases represent just a sample of how various courts, attempting to apply *Alameda Books*, have completely misapplied any evaluation of evidentiary "challenges."

Emphasizing this enormous and irreconcilable conflict, there are ***scores of other decisions misconstruing Alameda Books***, and this is a problem of huge constitutional

significance, underscored by those decisions that actually show an understanding of *Alameda Books*, and allow the ***rules*** of evidence to be utilized in evaluating countervailing ***evidence*** and invalidating unsupported legislation, when justified by a proper evaluation of ***the truth***. Of the cases that "get it right," the clearest is *Peek-a-Boo Lounge of Bradenton, Inc.v. Manatee County, Florida*, 337 F.3d 1251 (11th Cir. 2003), another case where the court complains that any assessment of evidence is difficult, "because of the large number of no-clear-majority decisions of the Court in cases of this type...." *Id.* at 1254.

The other decisions showing a split among virtually every level of the judiciary, and specifically among the federal circuit courts include: *Dima v. High Forest Township,* 2003 WL 21909571 (D.Minn. 2003)("... *Alameda Books* certainly clarifies the manner in which the Court should determine whether the municipality relied on evidence that was ''reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent governmental interest." *Alameda Books,* 535 U.S. at 438. Here, under the standard set forth in *Alameda Books,* the court found that genuine issues of fact existed as to whether High Forest Township was reasonable in relying upon the studies that provided the rationale for its ordinance. Primarily, it found persuasive that the studies relied upon by High Forest Township were conducted in metropolitan, not rural, areas, and the studies did not particularly examine the secondary effects of purely take-home fare. In addition, some of the studies were more than 25 years old."); *Dima v. High Forest Township,* 2003 WL 22736561 (D.Minn. 2003)("These ambiguous reports of negative perceptions, however, are not sufficient to meet the City's burden... the additional studies provided by High Forest Township still do not survive the scrutiny of *Alameda Books.*"); *Encore Videos*

v. City of San Antonio, 330 F.3d 288 (5th Cir. 2003)("The city justifies this ordinance on the ground that it will reduce the adverse secondary effects [such as increased crime and the reduction of property values] of sexually oriented businesses. Therefore, in order to demonstrate that the ordinance is narrowly tailored, the city must show that the ordinance addresses these problems."); *R.V.S v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004)(At this stage, courts are 'required to ask 'whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance.' ' *Ben's Bar,* 316 F.3d at 724 [quoting *Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728]. In other words, simply stating that an ordinance is designed to combat secondary effects is insufficient to survive intermediate scrutiny. The governmental interest of regulating secondary effects may only be upheld as substantial if a connection can be made between the negative effects and the regulated speech. In evaluating the sufficiency of this connection, courts must 'examine evidence concerning regulated speech and secondary effects.' *Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728."); *22nd Ave Station, Inc. v. City of Minneapolis*, 429 F. Suppp. 2d 1144(D.Minn. 2006)("As the Supreme Court explained in *Alameda,* even if the City has made a facially sufficient factual showing to justify its ordinance, the affected party may cast direct doubt on the City's rationale by showing that the City's evidence does not support its rationale or by furnishing evidence that disputes the City's factual findings...If the affected party succeeds in casting direct doubt, 'the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.' Plaintiff has presented sufficient evidence to cast direct doubt on the City's rationale. It has submitted both an expert affidavit and a peer-reviewed study casting grave doubt on the reliability of

the foreign studies upon which the City relied. It has submitted its own recent expert analysis of Plaintiff's impact on crime, property values, and blight in its surrounding neighborhood, which shows that Plaintiff has not caused the secondary effects that the City seeks to combat. The City has provided no contrary evidence regarding the impact of 22nd Avenue Station on its neighborhood."); *Flanigan's Enterprises Inc. v. Fulton County*, 2006 WL 2927532 (N.D. Ga. 2006)("Fulton County has failed to show that the ordinance furthers an important governmental interest because it did not consider the most comprehensive analysis of the secondary effects of alcohol consumption in adult entertainment establishments. Instead, the defendants, relied on less relevant studies that supported the county's goal. Once again, this court concludes that it was unreasonable to ignore the most relevant local study in favor of a less comprehensive study and foreign studies; therefore, the ordinance is an unconstitutional restraint on the plaintiffs' constitutional rights under the First Amendment.")

As the above excerpts show, the decisions construing the "shifting burden" of *Alameda Books* are truly "all over the road." What has resulted is exactly what Justice Souter feared, when he articulated his concerns with the haphazard, inconsistent and confusing evaluation (or lack thereof) of ***relevant evidence*** under ***appropriate evidentiary standards***. Those fears were well articulated, and have come to be, and they are adopted by the *Amici* as a very legitimate basis to accept review of the Petition:

> "In examining claims that there are causal relationships between adult businesses and an increase in secondary effects (distinct from disagreement), and between zoning and the mitigation of the effects, stress needs to be placed on the empirical character of

the demonstration available... See *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 510, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) ("[J]udgments ... defying objective evaluation ... must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose"); *Young,* 427 U.S., at 84, 96 S.Ct. 2440 (Powell, J., concurring) ("[C]ourts must be alert ... to the possibility of using the power to zone as a pretext for suppressing expression"). The weaker the demonstration of facts distinct from disapproval of the "adult" viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation.[FN3]

"FN3. Regulation of commercial speech, which is like secondary-effects zoning in being subject to an intermediate level of First Amendment scrutiny, *see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 557, 569, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), provides an instructive parallel in the cases enforcing an evidentiary requirement to ensure that an asserted rationale does not cloak an illegitimate governmental motive. See, *e.g., Rubin v. Coors Brewing Co.,* 514 U.S. 476, 487, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995); *Edenfield v. Fane,* 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). The government's "burden is not satisfied by mere speculation or conjecture," but only by "demonstrat[ing] that the harms [the government] recites are real and that its restriction will in fact alleviate them to a material degree." *Id.,* at 770-771, 113 S.Ct. 1792. For unless this "critical" requirement is met, *Rubin, supra,* at 487, 115 S.Ct. 1585, "a State could with ease restrict commercial speech in the service of other objectives that could not

themselves justify a burden on commercial expression," *Edenfield, supra,* at 771, 113 S.Ct. 1792.

"Equal stress should be placed on the point that requiring empirical justification of claims about property value or crime is not demanding anything Herculean. Increased crime, like prostitution and muggings, and declining property values in areas surrounding adult businesses, are all readily observable, often to the untrained eye and certainly to the police officer and urban planner. These harms can be shown by police reports, crime statistics, and studies of market***459** value, all of which are within a municipality's capacity or available from the distilled experiences of comparable communities. See, *e.g.,* ****1747***Renton, supra,* at 51, 106 S.Ct. 925; *Young, supra,* at 55, 96 S.Ct. 2440.

"And precisely because this sort of ***evidence*** is readily available, reviewing courts need to be wary when the government appeals, not to evidence, but to an uncritical common sense in an effort to justify such a zoning restriction. It is not that common sense is always illegitimate in First Amendment demonstration. The need for independent proof varies with the point that has to be established, and zoning can be supported by common experience when there is no reason to question it. We have appealed to common sense in analogous cases, even if we have disagreed about how far it took us. *See Erie v. Pap's A.M.,* 529 U.S. 277, 300-301, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion); *id.,* at 313, and n. 2, 120 S.Ct. 1382 (SOUTER, J., concurring in part and dissenting in part). [Is this all intended as a

> long block quote?] But we must be careful about substituting common assumptions for evidence, when the evidence is as readily available as public statistics and municipal property valuations, lest we find out when the evidence is gathered that the assumptions are highly debatable. The record in this very case makes the point. It has become a commonplace, based on our own cases, that concentrating adult establishments drives down the value of neighboring property used for other purposes. *See Renton,* 475 U.S., at 51, 106 S.Ct. 925; *Young, supra,* at 55, 96 S.Ct. 2440. In fact, however, the city found that general assumption unjustified by its 1977 study. App. 39, 45.
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> "The lesson is that the lesser scrutiny applied to content-correlated zoning restrictions is no excuse for a government's failure to provide a factual demonstration for claims it makes about secondary effects; on the contrary, this is what demands the demonstration. See, *e.g., Schad v. Mount Ephraim,* 452 U.S. 61, 72-74, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). " Souter, J., dissenting, 535 U.S. at 458,459.

What is clear is that the instant action shows, perhaps more than any other, that a governmental body, insistent on advancing a perhaps well intended but questionably useful regulation that simply eliminates lawful speech under the cloak of advancing some nebulous "governmental interest," can "pick and choose" what type of "evidence" it relies on in an effort to uphold legislation based, not on any legitimate concern with "secondary effects," but rather predicated on a content-based and discriminatory animus. Absent review and guidance, the same miscarriage of justice represented by the instant action is destined to be repeated, at the expense of the

businesses involved, their employees, their families and, most critically, at the expense of freedom.

CONCLUSION

The state of confusion and chaos involving the rules of evidence as they apply to the evaluation of challenges to adult entertainment legislation is monumental. These conflicts and inconsistencies, stemming from the inability or refusal to apply the "burden shifting" analysis set forth in *Alameda Books,* justify review of this action. Such review is necessary to ensure appropriate clarification of the rampant confusion and conflict with this Court's decisions in this area, all of which show the necessity for this Court to provide clarification, guidance, and precision in this critical area of First Amendment jurisprudence. For these reasons, *Amici* respectfully submit the foregoing additional considerations in support of instant petition for a writ of certiorari. It is respectfully requested that this Court grant review in this action.

Respectfully submitted,

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